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1968

IN THE

Supreme Court of the United States

RUTH E. BIDDLE, *Administratrix, Appellant*

v.

IDA M. BOWSER, *et al., Appellees*

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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OCTOBER TERM, 1967

No. _____

RUTH E. BIDDLE, *Administratrix, Appellant*

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ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Ohio, dismissing her appeal, *sua sponte*, entered on December 13, 1967; and the order denying her motion for rehearing, entered on January 17, 1968; and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Ohio, denying appellant's motion for a rehearing is reported in the Advance Sheets for Ohio Opinions, Second Series (Rehearing Docket), Volume 42, Number 2, Page 14, of January 22, 1968. Copies of the mandate dismissing the appeal and the order denying the rehearing are attached hereto as Appendix A.

JURISDICTION

This suit was brought under Ohio Sup. Ct. R. 11 (4). The motion for rehearing in that Court was brought under Ohio Sup. Ct. R. IX (1). The judgment of the Supreme Court of Ohio was entered on January 17, 1968, and notice of appeal was filed in the Court of Appeals of Montgomery County, Ohio, the court of record, March 29, 1968. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Barbier* v. *Connolly,* 113 U.S. 27, 28 L.ed 923 (1884); *Jordan* v. *Massachusetts,* 225 U.S. 167, 56 L.ed 1083 (1911); *Standard Oil Company* v. *Missouri,* 224 U.S. 270 (1911); *Throckmorton* v. *Holt,* 180 U.S. 552, 21 S.Ct. 474 (1900); *Whitfield* v. *Ohio,* 297 U.S. 431 (1935).

QUESTIONS PRESENTED

1. Is a litigant denied the due process of law when a lower court resolves a factual dispute adversely to him, based on that court's refusal to give any weight to substantial evidence of a scientific analysis of handwriting, directly bearing on that factual issue?

2. Is a litigant denied equal protection of the laws when the constitution of the State of Ohio provides for the use of scientific handwriting evidence to resolve a question of

forgery in criminal matters, but gives no weight to this type of evidence when a question of forgery arises in a civil matter?

3. When it is in the public interest of the citizens of the State of Ohio to have prompt adjudication of conflicting claims to property within the state, and certainty of title ownership of real property is desirable, for the same reason, has a common pleas court of Ohio denied due process of law to a litigant when, as a result of its delay in adjudicating conflicting claims to the property, the title is held in abeyance for a period of twenty-three years?

STATUTES INVOLVED

Ohio Const. art. 11, §39 and art. 1, §16; Ohio Rev. Code, §2317.36, §2505.071 and §2945.40 (Third Edition, 1964); are set forth in Appendix B hereto.

STATEMENT

On April 1, 1914, Jonas Priser died, survived by his widow and son, John, leaving farm property, in which his widow, Lydia Priser, retained a dower interest. On April 5, 1934, Lydia Priser died, releasing the dower interest in the property, located in Montgomery County, Perry Township, Ohio. On that date, therefore, John Priser, as the only heir at law of his mother, inherited real property by intestate succession, described as follows:

> "(a). Parcel 1, in the Township of Perry, and being a part of the west half of the southwest quarter of Section Numbered 21, Range 4, Township 5; and (b). Parcel 2, in the Township of Perry, and being the west half of the southwest quarter of Section 21, Town 5, Range 4, East, except 35 acres of land more or less, and being a part of the premises purchased by William Smith of David Hull."

From the time of the death of Jonas Priser, until on or about February 1, 1937, John Priser actively operated the real property listed, as a profitable farm. For many years, John Priser kept the minute details of the operation of the farm in a diary, recording transactions for feed, grain, tools and supplies. Assisting him in the operation of the farm were Mr. and Mrs. John C. Bowser, whose family had owned and operated a neighboring farm for some 60 years. On or about February 1, 1937, John Priser entered the Good Samaritan Hospital, Dayton, Ohio, for a prostate gland operation. While in the hospital, both Mr. Priser's daughter, Ruth Biddle, the plaintiff-appellant; and John and Ida Bowser, the defendant-appellees; visited Mr. Priser. In spite of the fact that Mr. Priser had run an abnormal temperature on February 22, 1937, and the fact that he had suffered two seizures of what appeared to be epilepsy while staying in the hospital, Mr. Priser was allowed to leave the hospital on February 23, 1937. The hospital records do not disclose that Mr. Priser's discharge was approved by a physician, or any of his relatives, but only by a nurse. The Bowsers took Mr. Priser from the hospital, in this condition, to the Bowser home, where he was immediately placed in bed to continue his recovery.

Sometime after this, Mr. Priser was up and around, however, the exact date that he arose from his sick bed is unknown to appellant. Less than eight weeks from the time that he left the hospital, to wit, April 14, 1937, a deed was executed transferring ownership of the Priser farm to the Bowsers, at least on its face. Present at the time of the alleged execution of the deed were: Harriet Isabel Shank, (nee Fleagle); Ida Bowser; John C. Bowser; and Carrie Tucker. Carrie Tucker was a Notary Public and notarized the deed. The transaction allegedly transpired at the residence of Carrie Tucker, who lived in Brookville, Ohio. After the alleged execution of the deed, John Priser never informed any of his kin about the conveyance of the prop-

erty. No mention was ever made of the conveyance in the daily diary kept by Mr. Priser.

John Priser died on November 24, 1944. On November 30, 1944, after going through the personal papers of the decedent, and learning the circumstances surrounding the execution of the deed, Ruth Biddle, Mr. Priser's daughter, administratrix of his estate and sole surviving heir, filed suit in the Court of Common Pleas, Montgomery County, Ohio, as the administratrix of this estate, against John C. Bowser, the putative grantee of the deed from John Priser. Ida Bowser was later added as a defendant. In her Petition for First Cause of Action, Case Number 95192, the plaintiff-appellant contended the stated consideration for the deed of April 14, 1937, from Priser to Bowser, was inadequate and that Priser's mind was affected at the time of the deed. At trial, on June 11, 1945, testimony was introduced that the deed was recorded, on April 15, 1937, in Deed Book 808, Page 42. The documentary tax stamps borne by the deed had been cancelled, using the initials "J.C.B.", which are the initials of John C. Bowser, the grantee, rather than the initials of John W. Priser, the grantor. Further disclosures made to the plaintiff-appellant from the Montgomery County records established the fact that John W. Priser and his wife, Mary Elizabeth Priser, were never divorced. Mr. Priser had, all his life, contended that he had remained married to Mary Elizabeth Priser, and thus the description of John W. Priser, Grantor, as "unmarried" on the questioned deed is inaccurate, and would not be acceptable to Mr. Priser as a proper description of his marital status at the time of the alleged execution of the deed.

On the facts presented at trial, the Common Pleas Court found: (1), there was no misrepresentation of the facts by the defendants and no influence exerted to induce the conveyance, in spite of testimony introduced by plaintiff-appellant to the contrary, summarized above; (2) that Mr.

Priser was not of unsound mind at the time of the conveyance, so that adequacy of consideration was not material.

On appeal, the Second District Court of Ohio, on April 26, 1951, affirmed the judgment of the Court of Common Pleas of Montgomery County, Ohio. However, for reasons unbeknownst to the plaintiff-appellant, no judgment entry was ever filed in the Second District Court of Appeals affirming the judgment.

Case Number 109402, filed January 26, 1956, was an action to impress a trust on the property conveyed by Priser to Bowser. During trial, the Common Pleas Court permitted an amendment of the petition to conform to evidence of a forgery of the signature of John W. Priser to the deed. Thus, to present proof of the elements of forgery, the plaintiff-appellant secured a certified photostatic copy of the deed recorded in Deed Book 808, Page 42, dated April 14, 1937, for examination by qualified handwriting experts. From known and unimpeachable sources, the plaintiff-appellant secured all of the *bona fide* examples of the writings and especially the signatures of her father, the later John William Priser. The normal standards of these writings and signatures were submitted as Plaintiff's Exhibits 3, 4, 5, 17 and 18. These standards were compared to the signature which appears on the deed recorded in Deed Book 808, Page 42, County Recorder's Office, Montgomery County, Ohio. Three of the leading and highest qualified handwriting experts in the United States made the same determination, that the signature affixed to the deed was not affixed by John W. Priser, owner of the two parcels of land that it purports to convey. One of these experts, Mr. Morris Nernberg, was injured in an auto accident and could not appear at the trial. Mr. Hugh L. Leggett, Sr., and Charles A. Appel, Jr., made appearance and their testimony is on record. Both of these experts testified that the deed recorded in Deed Book 808, Page 42, is forged. The entire transcript of testimony in

Case Number 95192 was admitted in evidence in Case Number 109402.

In its decision, the Court of Common Pleas, in Case Number 109402, held: (1), the decision of the court in Case Number 95192 precludes a finding of a constructive trust; (2), there is no evidence of any agreement to engraft a parole express trust; (3), a certificate of acknowledgment on a deed, in the absence of fraud, is conclusive evidence of the facts therein; and (4), the evidence of genuineness of a signature outweighs the handwriting experts' testimony of forgery.

Judgment entry, filed March 6, 1964. Plaintiff-appellant then raised the issues numbered one and two that are part of the appeal to this court, in her Bill of Exceptions, filed April 23, 1965. In discussing these issues, the Common Pleas Court of Montgomery County, Ohio, in its judgment entry, dated March 6, 1964, stated:

> "The court further finds that in view of all of this positive evidence that John W. Priser sold his farm to John Bowser, it would be impossible as a matter of law or fact, to make a Finding that the signature of John W. Priser was a forgery, based only on the evidence of the handwriting experts."

An appeal was taken from this decision to the Second District Court of Appeals, Ohio, Appeals Case Number 2950. A motion was filed at this time, in the Court of Appeals, to introduce additional testimony. This motion was allowed and additional evidence of forgery and an economic analysis of John W. Priser's financial affairs were then introduced.

On March 6, 1967, the Court of Appeals released its opinion in Case Number 2950, holding for the defendant-appellees, primarily on the ground that the plaintiff-appellant had failed to establish her case by clear, certain and conclusive evidence, stating on pages 21 to 23 of the opinion:

"The next question to be determined is whether the

signature of John W. Priser on the deed in question is a forgery.

"The certificate of acknowledgment attached to the deed was executed by Carrie E. Tucker, deceased, who signed also as a witness. The acknowledgment recites that: 'State of Ohio, Montgomery County, SS: On this 14th day of April, A. D. 1937, before me, a Notary Public in and for said County, personally came John W. Priser, the grantor in the foregoing deed, and acknowledged the signing thereof to be his voluntary act and deed.' The other witness signing the deed was Isabel Fleagle.

"A certificate of acknowledgment is conclusive evidence of the facts therein stated, in the absence of fraud. Two handwriting experts have testified that John W. Priser did not affix his signature to the deed and that the signing of his name thereto is a forgery. The evidence places Priser in Brookville on April 14, 1937, in the office of Carrie Tucker where the deed was executed. Ida Bowser testified that she saw Priser sign the deed. Isabel Fleagle Shank, who signed the deed as a witness, testified that she saw a small elderly gentleman affix the signature of John W. Priser. Priser is described in the evidence as a small elderly man. She further testified that she worked in an office adjoining the office of Carrie Tucker and had witnessed the signing of a number of documents at her request. She stated that 'Mrs. Tucker would call me into the office, introduce me to the person, and I would see the signature.' She further stated that the procedure in this case was the same as in the others.

"Forgery of a deed is generally defined as the false making of the instrument or the making of a material alteration in it with intent to defraud. 17 Ohio Jurisprudence (2d), Deeds, 182, Section 77.

"The signature of the grantor, though essential to a valid deed, need not be in the grantor's handwriting. 17 Ohio Jurisprudence (2d), Deeds, 125, Section 22.

"Throughout this case and the former case, the foundation of Appellant's claim is that John C. Bowser and Ida Bowser, his wife, perpetrated a fraud upon Priser. There is no evidence in this case tending to show that

either of the Bowsers affixed Priser's signature to the deed with intent to defraud him. For all we know, Priser may have authorized Mrs. Tucker or one of the Bowsers to affix his signature.

"The evidence here is insufficient to prove that a fraud was perpetrated upon Priser and that Priser's signature is a forgery. In the absence of fraud, it must be presumed that the signature is his acknowledged signature."

Plaintiff-appellant then filed a motion (Appendix Page A-54) for reconsideration with the Court of Appeals, Second Appellate District, on June 23, 1967. At the time of filing, plaintiff-appellant was proceeding without counsel, due to a disagreement between the family lawyer and the trial counsel as to the best method of proceeding. In spite of the fact that plaintiff-appellant was proceeding with this handicap, and so informed the court of this fact in her memorandum supporting the motion, the Court of Appeals denied the motion for reconsideration, on the narrow ground that it was not filed within the time allowed by Section 2505.071, Revised Ohio Code. (Decision on Motion, Dated August 22, 1967.)

Plaintiff-appellant then filed her Notice of Appeal to the Supreme Court of Ohio, in the Court of Appeals, Montgomery County, Ohio, 8:20 A. M., September 22, 1967, alleging that the appeal is on questions of law and involves a substantial Constitutional question. Plaintiff-appellant's characterization of the questions presented on the appeal to the Supreme Court of Ohio was:

1. What weight should be given to handwriting expert testimony in a case where the genuineness of the signature of a grantor, appearing on a deed, is disputed by the only heir of the grantor and a logical inheritor of the property, and contradictory proof of the authenticity of the signature is offered by testimony of the grantees, strangers to the grantor, who claimed to be present at the time of the signature?

2. When it is in the public interest of the citizens of the State of Ohio to have prompt adjudication of conflicting claims to property within the state, and certainty of title ownership of real property is desirable, for the same reason, is a county common pleas court acting against the public interest when, as a result of its delay in adjudicating conflicting claims to the property, the title is held in abeyance for an undue length of time?

The mandate of the Supreme Court of Ohio, dismissing the appeal in this case, was entered in this cause on December 13, 1967. Further, the Final Order of the Supreme Court of Ohio, denying a rehearing in this case, was entered in this cause of January 17, 1968.

THE QUESTIONS ARE SUBSTANTIAL

The Ohio State Constitution, Article 11, Section 39, provides that laws may be passed for the use of expert witnesses in criminal matters. Pursuant to this authority granted under Article II, Section 39, the State of Ohio has enacted a code provision allowing the use of expert witnesses in criminal insanity matters. Baldwin's Revised Ohio Code, §2945.40 (Third Edition, 1964). In addition, the Ohio code allows the admission of written reports prepared by an expert, evidently in both civil and criminal matters, and under this provision, obviates the necessity of the expert himself appearing in court. Baldwin's Revised Ohio Code, §2317.36 (Third Edition, 1964). However, the Ohio constitution and the codification of the law of the State of Ohio is silent with regard to any other matters touching on expert witnesses or expert testimony.

In the case which is the basis of this appeal, testimony of handwriting experts was extensively employed by the appellant. The courts of the State of Ohio have not favored the use, nor have they been accustomed to attaching much weight, to such testimony. *Bell* v. *Brewster,* 10 N. E. 679, 44

Ohio St. 690, 17 Wkly. Law Bull. 198 (1887) is typical of the approach taken by the Ohio courts, even to this date. The judgments of the Court of Appeals of Montgomery County, Ohio, and the Supreme Court of Ohio, which in effect, rejected the expert testimony, complied with the letter of the law of Ohio, as interpreted by the courts of that state. However, appellant contends that the spirit of the law was not sufficiently appreciated by either of the courts, for the circumstances of appellant's case were all but ignored, resulting in a rigid application of the case law to the facts of this case.

1. Appellant's use of handwriting expert testimony was the most practical and effective device for her purposes here. This is pointed up by the fact that the alleged signatory grantor of the deed in question was deceased; in addition, the other witnesses to the transaction were either unavailable, deceased or adverse to appellant's interest in the real property. Forced into this position by the circumstances of her case, therefore, appellant resorted to the one scientific device which has found gradual acceptance in many trial courts throughout the United States. *O'Connor* v. *Slaker*, 105 Neb. 88, 179 N. W. 401, 12 A. L. R. 199 (1920); *Marden* v. *Dorthy*; 160 N. Y. 39, 54 N. E. 726 (1899); *Boyd* v. *Gosser*, 82 So. 758, 6 A. L. R. 500 (Florida, 1918).

The handwriting experts employed by appellant are, without a doubt, two of the leading men in their field in the United States. Charles Appel's qualifications, (Record Page No. 27, 28) were included in the record before both courts. His national reputation as a questioned document examiner is enhanced by his service with the Federal Bureau of Investigation. Hugh Leggett, Jr., is a prominent questioned document examiner whose qualifications, in the record, Page No. 1, 2, speak for themselves.

Disregarding not only the detailed analysis of these experts, but more important still, the circumstances surround-

ing the execution of the deed, the Ohio courts have, to date, denied appellant due process of law. The cases decided by this court proceed upon the theory that given a court of justice which had jurisdiction and acts not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. *Jordan* v. *Massachusetts,* 225 U. S. 167, 56 L. Ed. 1038, 32 S. Ct. 651 (1911); *Standard Oil Company* v. *Missouri,* 224 U. S. 270 (1911).

The evidence given by the two distinguished handwriting experts in this case is far more substantial, and is entitled to considerably more weight than afforded it in the Ohio courts. As a matter of fact, the character and effect of the evidence presented by the appellant is so positive, so persuasive, that to ignore its full weight and effect is to deny appellant due process of law because of arbitrary action by the lower Ohio courts.

This court long ago held, in the celebrated case of *Throckmorton* v. *Holt,* 180 U. S. 552, 569, 21 S. Ct. 474, 491 (1900):

> "An expert in regard to handwriting is one who had become familiar with the handwriting of the individual in regard to whom the question is raised. Handwriting is a physical matter, and does not itself represent any characteristics of the writer as to composition or general style, or as to his literary or legal attainments. It is to be seen and the characters recognized by the eye."

There have been, since that case, a great many refinements in the procedures of handwriting experts, such as: analysis of ink and paper used through precise chemical tests; enlargement and comparison of known writing samples with samples questioned as forged; analysis of the physical handwriting style and habits of the individual developed over a lifetime. Lacy, *Opinion Evidence or Facts?*

23 Wash. & Lee L. Rev. 12 (Spring, 1966). Both handwriting experts in this case used many, if not all of the methods described above.

2. This court has frequently referred to both the equal protection clause and the due process clause in discussing the constitutionality of statutes, e. g., *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 S. Ct. 357 (1884). When a state constitutional provision is questioned in the light of these two clauses, this court has scrutinized how the provision of the constitution affects the rights of the citizens coming within the purview of the provision or statute *vis-à-vis* other citizens similarly situated. Thus:

> "All persons should be equally entitled to pursue their happiness and acquire and enjoy property; they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition . . ." *Id* at 31, 28 L. Ed. at 925.

Appellant contends that the failure of the constitution of the State of Ohio to provide for the use of expert witnesses in civil trials has resulted in a patchwork application of expert testimony in civil cases. Thus in a recent case before the Supreme Court of the State of Ohio, *McKay Machine Company* v. *Rodman*, 11 Ohio St. 2d 77 (1967), the court placed great reliance on the testimony of an expert welder to fortify its holding:

> "1. In all proceedings involving matters of a scientific, mechanical, professional or other like nature, requiring special study, experience or observation not within the common knowledge of laymen, expert opinion testimony is admissible to aid the court or the jury in

arriving at a correct determination of the litigated issue.

"2. The art of welding is a subject the nature of which is not within the common knowledge of laymen, and the testimony and opinion of an expert witness on this subject is admissible.

"3. Expert opinion testimony is admissible as to an ultimate fact without infringing the function of the jury, if the determination of such ultimate fact requires the application of expert knowledge not within the common knowledge of the jury. (Ohio Supreme Court Case No. 40497)."

More important to the appellant, however, is the fact that when the issue of forgery is raised in a criminal proceeding, the Ohio courts resort to the use of handwriting experts to allow the state to prove its case. *Counts v. State,* (App.) 31 L. R. 327 (1930). Appellant contends that the issue of forgery should not be treated differently depending on whether the state or a private litigant is the complaining party.

3. It is a fundamental and universal rule of law, in all of the United States, that the title to real property must be certain and that any claims beclouding the title should be promptly adjudicated between the claimants. That this is the rule in the State of Ohio is certain, without further reference to statutory or case authority, other than the Ohio Constitution. Ohio Const. Art. I, 16 (1912). Both the Bowsers and the Biddles were thus entitled to have their conflicting claims to the property 'administered without denial or delay.' *Ibid.* Further, 'Due course of law,' in the Ohio constitution, Article I, 16, is the equivalent of 'due process of law' in the federal constitution. *In re Pollak,* 89 Abs. 112, 182 N. E. 2d 69 (1962).

However, in this case, the title to the John Priser farm was in a state of flux from the time of filing plaintiff-appellant's Petition for First Cause of Action, in Case Number

95192, November 30, 1944, to September 11, 1967, the date of filing of the Judgment Entry of the Court of Appeals of Montgomery County, Ohio, deciding plaintiff-appellant's appeal from an adverse decision of the second case filed by her in the Court of Common Pleas for Montgomery County.

Plaintiff-appellant alleges that the failure of the Court of Appeals for Montgomery County to ever file a judgment entry, recording its decision in case number 95192, which it decided on April 26, 1951, is a denial of due process of law or due course of law to the plaintiff-appellant. This is a denial to the plaintiff-appellant because, in both case number 95192, and the appeal stemming from it, appeal number 1899, the defendant-appellee prevailed. However, neither defendant-appellee nor his counsel took steps to finally put the matter to rest, that is, to ensure that a judgment entry was filed for appeals case number 1899.

4. Further, the Federal Supreme Court may consider jurisdiction over an appeal from a decision of the highest court of the state in which the question was treated as properly raised and was passed upon adversely to the claim of unconstitutionality, although the record fails to show that constitutional objections to a statute were properly raised in the trial court. *Whitfield* v. *Ohio,* 297 U. S. 431 (1935). In the instant case, the constitutionality of the Ohio courts' action was not raised in the trial court. However, it was not raised by appellant until she filed her memorandum in support of jurisdiction in the Supreme Court of Ohio for a specific reason: Additional testimony was submitted to the Court of Appeals of Montgomery County, Ohio, in February 22, 1966. It was therefore not until Judge Sherer of the Court of Appeals of Montgomery County, Ohio, ruled adversely to the cumulative weight of all of the testimony introduced by plaintiff-appellant, both at the trial level and when first introduced into the case in February, 1966, that the plaintiff-appellant could affirmatively state that the ap-

peal in her case was matured and ripe for appeal to this court.

It is therefore submitted that the decision of the Supreme Court of Ohio fails to recognize the seriousness of the errors committed by the inferior courts of that state. The errors committed by those courts are so fundamental to appellant's rights as a citizen of the State of Ohio and the United States that she deems them worthy of consideration by this court.

Respectfully submitted,

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APPENDICES